IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1439

JERRY LEE SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Jerry Lee Smith respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit affirming petitioner's conviction by a jury for violations of 18 U. S. C. § 1461 for seven distributions of allegedly "obscene" materials wholly within the State of Iowa, despite the Iowa Legislature's express decriminalization of the distribution of arguable "obscene" materials to adults in Iowa. The petition thus presents a significant question of federal-state relations in the "obscenity" area.

OPINIONS BELOW.

The Court of Appeals directed that its opinion not be printed or published. The opinion is reproduced in the Appendix herein (Appendix, p. A-1). The Federal District Court for the

Southern District of Iowa issued an unreported order denying a motion for a new trial, which appears at Appendix, p. A-4.

JURISDICTION.

The jurisdiction of the Iowa District Court was based on 18 U. S. C. § 3231. The jurisdiction of the Court of Appeals was founded upon 28 U. S. C. § 1291.

The judgment of the Court of Appeals was entered on February 13, 1976. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1). On March 9, 1976, Mr. Justice Blackmun extended the time for filing this petition to April 12, 1976.

QUESTIONS PRESENTED.

1. Does the conscious determination of the Iowa legislature, that contemporary community standards in that state do not require criminal prohibition of the distribution of arguably "obscene" materials to consenting adults, establish the local community standard which must be applied by a federal court and jury in the context of a prosecution, under 18 U. S. C. § 1461, for a wholly intrastate distribution of allegedly "obscene" materials through the United States mails?

2. Is 18 U. S. C. § 1461 unconstitutionally vague as applied in this case?

3. Is it a denial of due process of law to refuse to permit a defendant at *voir dire* to inquire of prospective jurors as to their knowledge of local "contemporary community standards" concerning what material, taken as a whole, appeals to the prurient interest?

CONSTITUTIONAL PROVISIONS INVOLVED.

First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS INVOLVED.

Chapter 725 of the Code of Iowa prohibits the distribution of "obscenity" only to minors. The statute is exclusive and expressly preempts any prosecution for the distribution of materials to adults. The statute provides in pertinent part:

> "725.9. Uniform Application. In order to provide for the uniform application of the provisions of Sections 725.1 to 725.10 relating to obscene material applicable to minors within this state, it is intended that the sole and only regulation of obscene material shall be under the provisions of these sections, and no municipality, county, or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials. All such laws, ordinances and regulations, whether enacted before or after said sections, shall be or become void, unenforceable and of no effect upon July 1, 1974."

Chapter 725 of the Code of Iowa is printed in its entirety at Appendix, p. A-7.

The federal statute here at issue, 18 U. S. C. § 1461, provides in pertinent part:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * * *
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made . . .
>
> * * * * *
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of Title 39 to be nonmailable,

> or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulation of disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

* * * * *

STATEMENT OF THE CASE.

This case concerns the decision of the District Court, affirmed per curiam by the Court of Appeals, to permit federal jurors in Iowa to substitute their own, wholly subjective and unascertainable standard of "obscenity" for the express "contemporary community standard" established by the Iowa Legislature.

In 1974, the Iowa Legislature voted to decriminalize the distribution of arguably "obscene" materials to adults within Iowa by enacting Chapter 725 of the Code of Iowa.* On March 26, 1975, the United States Grand Jury for the Southern District of Iowa returned an Indictment charging the petitioner Jerry Lee Smith with seven violations of the federal statute prohibiting distribution of "obscene" materials through the United States mails, 18 U. S. C. § 1461. The petitioner pleaded not guilty, and was tried by a jury and convicted on each count of the Indictment on September 9, 1975. On October 14, 1975, petitioner was sentenced to three years imprisonment, of which all but six months were suspended. The defendant was placed on probation for three years.

The mailings involved occurred totally within the State of Iowa. All were made at the written request of the purported re-

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* The Iowa House of Representatives passed Chapter 725 by a vote of 87-1. Journal of the House, 65th General Assembly, 1974 Regular Session, 2291. The Iowa Senate passed Chapter 725 by a vote of 46-0. Journal of the Senate, 65th General Assembly, 1974 Regular Session, 1638.

cipients. The mailings were addressed to federal postal drop boxes with fictitious persons listed as owners. The mail delivered to those boxes is opened by postal inspectors. No evidence was ever adduced that the materials entered any other state.

Prior to the selection of the jury, petitioner submitted proposed *voir dire* questions designed to elicit the understanding of prospective jurors concerning the "contemporary community standards" under which the alleged "obscenity" of the materials should be measured.* The District Court refused to ask those questions and denied petitioner the right to make his own inquiries of the prospective jurors.

The government offered no evidence at trial concerning what local "contemporary community standards" governed the "obscenity" of the materials involved, simply introducing the materials themselves. Petitioner's motion for acquittal at the conclusion of the government's case was denied.

In defense, petitioner placed in evidence a copy of Chapter 725 of the Iowa Code and established that materials comparable to those for which he was being prosecuted were available for over the counter purchase throughout Iowa. At the close of the evidence, petitioner's renewed motion for acquittal, based on the claim that the appropriate community standard for measuring the "obscenity" of the materials was established by

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* These questions were as follows:

"Will those jurors raise their hands who have any knowledge of the contemporary community standards existing in this federal judicial district relative to the depiction of sex and nudity in magazines and books?

"The following individual questions are requested for each juror who answers the above question in the affirmative.

"Where did you acquire such information?

"State what your understanding of those contemporary community standards are.

"In arriving at this understanding, did you take into consideration the laws of the State of Iowa which regulate obscenity?

"State what your understanding of those laws are?"

the Iowa Legislature in Chapter 725 of the Code of Iowa, was denied.

The District Court then proceeded to instruct the jurors that "you are each entitled to draw on your own knowledge of the views of the average person in the community from which you come as well as consider the evidence presented as to the state law on obscenity and materials available for purchase in certain stores as shown by the evidence." After the guilty verdict was returned, petitioner moved for a new trial, but the motion was denied. Petitioner appealed the District Court's rulings to the Court of Appeals, which affirmed per curiam.

REASONS FOR GRANTING THE WRIT.

I.

THE COURTS BELOW IMPROPERLY DISREGARDED THE "CONTEMPORARY COMMUNITY STANDARD" ESTABLISHED BY THE IOWA LEGISLATURE.

The issue of federal-state relations presented in this case—the conflict between a state's decision to decriminalize "obscenity" and a federal prosecution under 18 U. S. C. § 1461 for an intrastate distribution—has not previously been before this Court.* The question raised is ripe for a decision by this Court.

A number of states have chosen to deregulate "obscenity" since the issuance of this Court's *Miller* decisions.** In addition to Chapter 725 of the Code of Iowa, *see* the similar statutes of New Mexico, *N. M. Stat. Ann.* Ch. 40 §§ 50.1-50.8 (Supp. 1975); South Dakota, *S. D. C. L.* § 22-24-28 (Supp. 1975); Vermont, 13 *V. S. A.* §§ 2801-2807 (Supp. 1975); and West Virginia, *W. Va. Code Ann.* Ch. 61 § 8A(1)-(7) (Cum. Supp. 1975). Hawaii has repealed its "obscenity" law. *Hawaii Rev. Stat.* Ch., 37, § 712-1212 repealed SL 1973, C136 § 10. Further, Alaska regulates only the distribution, exhibition, and sales of "objectionable" comic books. *Alaska Stat. Ann.* § 11.40.160-11.40.180 (1973).

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* The Court recently denied certiorari in *Danley* v. *United States,* 523 F. 2d 369 (9th Cir. 1975), *cert. denied,* 44 U. S. L. W. 3469 (February 23, 1976), which involved a similar conflict between Oregon's deregulation of "obscenity" and an 18 U. S. C. § 1461 prosecution, but the record there reflected interstate shipments of the allegedly "obscene" materials. To the extent *Danley* is not distinguishable on this ground, it is wrongly decided for the reasons stated herein and further buttresses the necessity for a ruling by this Court.

** *Miller* v. *California,* 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49 (1973); *Kaplan* v. *California,* 413 U. S. 115 (1973); *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123 (1973); *United States* v. *Orito,* 413 U. S. 139 (1973).

These states have taken an approach directly sanctioned by this Court. Thus, in *Paris Adult Theater I* v. *Slaton,* 413 U. S. 49, 64 (1973), the Court stated:

> "[T]he States, of course, may follow such a 'laissez faire' policy and drop all controls on commercialized obscenity, if that is what they prefer . . ."

In *United States* v. *Reidel,* 402 U. S. 351 (1971), the Court even suggested that such an approach may be the most "desirable."

> "It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential. *This may prove to be the desirable and eventual legislative course.* But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances." *Id.* at 357. (Emphasis added.)

But, the rulings below permit federal juries to abrogate the conscious determination of a state legislature to "drop all controls on commercialized obscenity." Under those rulings, federal jurors in the context of a prosecution under federal law can substitute their own judgments as to the "obscenity" of a work for the express finding of the state legislature that nothing is "obscene" for adults in that state. Such a result is fundamentally at odds with this Court's recent "obscenity" decisions and the federalist principles enunciated therein.

In the first place, this Court has firmly rejected the notion, apparently adopted by the District Court and the Appellate Court below, that "juries have unbridled discretion in determin-

ing what is "obscene." *Jenkins* v. *Georgia*, 418 U. S. 153, 160 (1974). As stated in *Hamling* v. *United States*, 418 U. S. 87, 118 (1974), "The definition of obscenity . . . is not a question of fact [for the jury], but one of law [for the court]; the word 'obscene' as used in 18 U. S. C. § 1461, is not merely a generic term, but a legal term of art." Consequently, this Court has directed that jurors considering the "obscenity" of a work be "guided always by limiting instructions on the law." *Miller* v. *California*, 413 U. S. 15, 30 (1973).

Secondly, the Court has determined that the content of those legal guidelines should properly be set by the state legislatures. The Court has recognized that the reguiation of "obscenity" is predominately a matter of state, not federal, interest. The interests in regulating "obscenity" were defined by the Court in *Paris Adult Theatre I* v. *Slaton, supra*, 413 U. S. at 57-58:

> "[W]e hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests 'other than those of the advocates are involved.' *Breard* v. *Alexandria*, 341 U. S. 622, 642 (1951). These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."

These interests are the "traditional" province of the individual states in the exercise of their police power to protect the public welfare. As stated in *Miller, supra*, 413 U. S. at 29:

> "Nor should we remedy 'tension between state and federal courts' by arbitrarily depriving the States of a power [to regulate "obscenity"] reserved to them under the constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day."

No independent federal interests were identified.

Indeed, the Court expressly found that local interests in this area transcend any need for national uniformity.

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City . . . People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 32-33.

Consequently, in an attempt to ameliorate the "tension" between these state interests and the federal system, the Court expressly rejected a national standard and mandated that the "obscenity" of a work be judged by the trier of fact with reference to the "contemporary community standards" of the "average person" in the local community involved, "guided always by limiting instructions on the law."

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24.

In recognition of the state interests involved, the Court declared that the state legislatures were empowered to establish the applicable community standard. Therefore, the Court in *Miller* concluded:

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts." *Id.* at 25.

In undertaking this effort, the Court also affirmed the right of the state legislature to preempt any more localized community standard than that established by the legislature.

> "*Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*." *Jenkins* v. *Georgia, supra,* 418 U. S. at 157.

In *Miller*, the Court held that California could constitutionally proscribe "obscenity" in terms of a "statewide" standard.

As detailed *supra*, at p. 9, the Court recognized the right of a state legislature to decriminalize "obscenity." Indeed, *Miller* rejected the "national" standards test on the ground, *inter alia*, that a "local" standard would allow a given community to apply a more permissive test:

> "The use of 'national' standards . . . necessarily implies that materials found tolerable in some places, but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable." 413 U. S. at 32 n. 13.

Moreover, the Court has recognized that a state's determination of the local "contemporary community standards" is binding upon jurors. As made clear in *Hamling, supra*, the local community standard approach was adopted precisely to prevent "obscenity" judgments from being based on the personal prejudices of individual jurors.

> "This Court has emphasized on more than one occasion that a principal concern in requiring that a judgment [of 'obscenity'] be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group. *Miller* v. *California, supra,* at 33; *Mishkin* v. *New York*, 383 U.S. 502, 508-509 (1966); *Roth* v. *United States*, 354 U.S. [476], at 489 [1957]." 418 U. S. at 107.

Here, the Iowa Legislature has expressly determined that "contemporary community standards" in Iowa do not require a prohibition of the distribution of arguably "obscene" materials to adults and declared that its determination preempts any other prohibition governing a geographic area of lesser scope. But the courts below ruled that Iowa's legislative determination is not binding on a jury applying federal law, and that the jury can adopt its own, different standard.

The courts below relied on this Court's decision in *Hamling, supra*. In *Hamling*, the Court affirmed a conviction under 18 U. S. C. § 1461 by a jury in the Federal District Court for the Southern District of California for interstate mailings of allegedly "obscene" materials, mailed from California. In *Hamling*, the Court expressly extended the local "contemporary community standard" test to prosecutions under 18 U. S. C. § 1461:

> "In *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123 (1973), a federal obscenity case decided with *Miller*, we said:
>
> > 'We have today arrived at standards for testing the constitutionality of state legislation regulating obscenity. See *Miller* v. *California, ante*, at 23-25. These standards are applicable to federal legislation.' *Id.*, at 129-130.'
>
> Included in the pages referred to in *Miller* is the standard of the 'the average person, applying contemporary community standards.' In view of our holding in *12 200-ft Reels of Film*, we hold that 18 U.S.C. § 1461 incorporates this test in defining obscenity." 418 U. S. at 105.

The District Court and the Court of Appeals noted that ruling and cited the following statement of the Court as supporting the proposition that the content of the local community standard in an 18 U. S. C. § 1461 prosecution is the exclusive province of the federal jury.

> "The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowl-

> edge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." *Ibid.*

But, in *Hamling*, the Court was not faced with the situation presented here, where the forum state legislature has expressly declared the applicable "contemporary community standard" for the local community involved, the geographic area encompassing the Southern District of Iowa. Consequently, the above quoted statement from *Hamling*, relied upon below, has no application to the present case.

Under the approach adopted by the District Court and the Court of Appeals, two juries—one state and one federal—drawn from the same local community, are guided by totally different conceptions of the community standard in "obscenity" prosecutions. But, in *Miller*, the Court ordered the application of one local "contemporary community standard," governing both federal and state "obscenity" prosecutions. Thus, in *Miller*, the Court summarized its holding:

> "In sum, we . . . hold that obscenity is to be determined by applying 'contemporary community standards,' see *Kois* v. *Wisconsin*, [408 U. S. 229 (1972)] *supra*, at 230, and *Roth* v. *United States*, [354 U.S. 476 (1957)] *supra*, at 489, not 'national standards.' " 413 U. S. at 36-37.

The Court's citation of both *Kois*, a state case, and *Roth*, a federal case, indicates that the same "contemporary community standards" should be applied in federal, as well as state, prosecutions.

Hence, to the extent a state in which a distribution occurs has adopted a local community standard of non-"obscenity" for adults, that legal guideline should be binding on a federal, as well as a state, jury. Any other result would be inconsistent with this Court's deliberate de-nationalization of "obscenity" and its express recognition of the state's right to establish the governing community standards. Moreover, if the judgment of the state

legislature is ignored, the effect is to have the federal statute preempt state law.

Yet, in *Schwartz* v. *Texas*, 344 U. S. 199, 202-203 (1952), this Court stated that, "The exercise of federal supremacy is not lightly to be presumed." In *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U. S. 470 (1974); *Merrill, Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U. S. 117 (1973); *New York Dept. of Social Services* v. *Dublino*, 413 U. S. 405 (1973); and *Goldstein* v. *California*, 412 U. S. 546 (1973), the Court has recently affirmed the need to protect federalism by a strict interpretation of federal preemption. *See also* Note, "The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court", 75 *Colum. L. Rev.* 623 (1975).

Thus, in *Goldstein*, the Court refused to hold that California's prohibition on record piracy was preempted by federal copyright law. The Court emphasized the traditional role of the states in promoting "those portions of science and the arts which were of local importance," 412 U. S. at 557, and concluded that the limited national interests involved did not conflict with the divergent interests of citizens in different parts of the country. The Court stated:

> "No conflict will necessarily arise from a lack of uniform state regulation, nor will the interest of one state be significantly prejudiced by the actions of another." *Id.* at 560.

Similarly, in the "obscenity" area the Court has recognized the predominate state interests and the lack of any need for national uniformity. *Miller, supra*, 413 U. S. at 32-33, quoted *supra* at p. 11.

Ware concerned a claim of a forfeiture by the respondent of benefits in a non-contributory profit-sharing plan under the terms of an employment agreement. Petitioner Merrill, Lynch argued that a New York Stock Exchange Rule, enacted pursuant to Section 6 of the Securities Exchange Act of 1934, 15 U. S. C. § 78(f), directing arbitration of any controversy arising from employment terminations, preempted two California state

statutes. The first statute voided the employment agreement for including a non-competition clause; the second required that arbitration clauses be disregarded in individual actions for the collection of wages. The Court refused to preempt, stressing California's "strong policy of protecting its wage earners." 414 U. S. at 139.

In reaching its decision, the Court noted the legitimate expectation that an individual will receive uniform treatment in the state of his residence.

> "In effect, we are asked to sacrifice the individual's expectation of uniform treatment in the State of his residence for uniformity of application of the effect of an exchange's rules." *Id.* at 138.

Here, petitioner Jerry Lee Smith could legitimately expect that his conduct in distributing arguably "obscene" materials to soliciting adults in Iowa was sanctioned by Chapter 725 of the Code of Iowa. In such circumstances, *Ware* dictates that preemption is unfair and unwarranted, absent compelling national interests in uniformity, which have been expressly rejected by this Court in the "obscenity" area.

In *Ware*, the Court, relying heavily on the analytical framework in *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963), also emphasized the need to harmonize conflicting statutes.

> "Our analysis is also to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' [Silver, *supra*] *Id.*, at 357, 10 L. Ed. 2d 389." 414 U. S. at 127.

Here, the conflict between Iowa law and 18 U. S. C. § 1461 is appropriately reconciled by holding that the Iowa statute establishes the "contemporary community standard" for purposes of an 18 U. S. C. § 1461 distribution to Iowa residents. This approach is particularly apt given the wholly intrastate nature of the distribution.

Federal courts have previously turned to state law to flesh out the details of Congressional enactments. For example, in the securities law area, federal courts have looked to the forum state to obtain the statute of limitations for suits brought under § 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. 78(j)(b), which is silent on the point. The premise for this procedure is stated in *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395 (1946):

> "As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation . . . [citing cases] The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles. See *Board of Comm'rs* v. *United States*, 308 U. S. 343, 349-50, 351-52 [1939]."

Here, Congress has not stated what community standard applies in an 18 U. S. C. § 1461 prosecution.

In a related context, the *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), line of cases reflects this Court's willingness to apply state law, rather than strive for an unjustified national uniformity. In holding that federal courts must apply the conflict of laws rules of the forum state, the Court stated in *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496 (1941):

> "Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general' law of conflict of law."

Under the federalist principles of *Erie*, a federal jury in a tort case in Iowa could not disregard Iowa's state law which permits an automobile driver to make a right turn after stopping at a red

light on a traffic signal and hold that conduct to be negligent *per se* on the basis of the individual jurors' own judgment as to the propensities of a "reasonable person" under the circumstances. By the same token, under the principles established in *Miller* and its progeny, a federal jury in Iowa should not be permitted to disregard the state legislature's decision, that community standards in Iowa do not require the criminal prohibition of distributions of arguably "obscene" materials to adults in Iowa, and convict a person for such conduct on the basis of the individual jurors' own belief as to the "contemporary community standards" of the "average person" in the local community.

Consequently, the Court should grant certiorari to resolve the conflict between Iowa's legislative decision to decriminalize the distribution of arguably "obscene" materials to adults in Iowa and the interpretation of 18 U. S. C. § 1461 adopted by the District Court and the Court of Appeals.

II.

18 U. S. C. § 1461 IS UNCONSTITUTIONALLY VAGUE AS APPLIED.

The rulings below, that jurors in an 18 U. S. C. § 1461 case are themselves able to determine what community standard applies and what the dimensions of that standard are, render that statute unconstitutionally void for vagueness. Vague laws are invalid under the Due Process Clause of the Fifth Amendment and the First Amendment if they: do not provide the public with fair notice of what is prohibited; are subject to arbitrary enforcement and application; or infringe on the exercise of protected rights. As stated in *Grayned* v. *City of Rockford*, 408 U. S. 104, 108-109 (1972):

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to ' "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' " (Footnotes omitted.)

Statutes which affect the area of First Amendment rights, like 18 U. S. C. § 1461, are, therefore, particularly vulnerable to attack for vagueness, because the "standards of permissible statutory vagueness are strict in the area of free expression." *NAACP* v. *Button*, 371 U. S. 415, 432 (1963). The Court has imposed a strict standard recognizing that "the freedoms of expression . . . are vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66 (1963). A strict standard is particularly apt in the "obscenity" area where the line between the "obscene" and the "non-obscene" is admittedly elusive. *Stanley* v. *Georgia*, 394 U. S. 557, 566 (1969). *Cf. Miller* v. *California, supra*, 413 U. S. at 24.

Under these standards, the interpretation of 18 U. S. C. § 1461 by the District Court and the Court of Appeals is necessarily invalid. The subjective whim of individual jurors as to the governing "community standard" concerning what is "obscene" is unascertainable in advance of the verdict. Indeed, appellate review of the jury's verdict is effectively precluded as the "community standard" applied may never be known. Such an approach is obviously subject to arbitrary enforcement and

application* and of necessity must "chill" the exercise of protected First Amendment rights.

III.

THE DISTRICT COURT'S REFUSAL TO PERMIT VOIR DIRE QUESTIONING OF THE JURORS' KNOWLEDGE OF LOCAL "CONTEMPORARY COMMUNITY STANDARDS" DEPRIVED PETITIONER OF DUE PROCESS OF LAW.

The District Court refused to permit questioning of prospective jurors at *voir dire* concerning their knowledge of the "contemporary community standards" as to what materials, taken as a whole, appeal to prurient interests. That ruling was affirmed by the Court of Appeals. In so ruling, the courts below denied petitioner his due process right to determine whether he would be tried by a jury capable of rendering a fair and impartial jury.

This Court has recognized that a basic element of the Sixth Amendment guarantee of an impartial jury is the right to make appropriate inquiries at *voir dire*. Thus, in the landmark decision of *Aldridge* v. *United States*, 283 U. S. 308 (1931), the Court reversed a murder conviction due to the failure of the trial court judge to make a *voir dire* inquiry as to the racial prejudices of prospective jurors. In both *Dennis* v. *United States*, 339 U. S. 162 (1950) and *Morford* v. *United States*, 339 U. S. 258 (1950), the Court held that defendants have the right to inquire into political prejudices.

The purpose of such *voir dire* questioning is to permit the defendant to determine whether a prospective juror is capable of rendering an impartial verdict. As stated by Justice Marshall in his concurrence in *Ham* v. *South Carolina*, 409 U. S. 524, 531-32 (1973):

* Indeed, in *Jenkins* v. *Georgia*, 418 U. S. 153 (1974) the Court was compelled to reverse a jury verdict affirmed by the Georgia Supreme Court, that the celebrated movie, "Carnal Knowledge," was criminally "obscene."

> "We have never suggested that this right to impartiality and fairness protects against only certain classes of prejudice or extends to only certain groups in the population. It makes little difference to a criminal defendant whether the jury has prejudged him because of the color of his skin or because of the length of his hair. In either event, he has been deprived of the right to present his case to neutral and detached observers capable of rendering a fair and impartial verdict. It is unsurprising then, that this Court has invalidated decisions reached by juries with a wide variety of different prejudices."

Here petitioner sought to determine whether prospective jurors had any knowledge of "contemporary community standards" or whether their judgment would be based on personal bias concerning what sexually related material should be made available to adults in the community. "Obscenity" is a controversial issue and petitioner's limited proposed inquiry was essential to assure him of his constitutional right to a fair trial.

CONCLUSION.

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 10, 1976.

APPENDIX.

UNITED STATES COURT OF APPEALS,
For the Eighth Circuit.

No. 75-1802.

JERRY LEE SMITH, d/b/a INTRIGUE, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: January 15, 1976
Filed: February 13, 1976

Before CLARK, *Associate Justice,* Retired,* BRIGHT and HENLEY, *Circuit Judges.*

PER CURIAM:

Jerry Lee Smith was convicted in the United States District Court for the Southern District of Iowa on seven counts of placing non-mailable matter in the United States mails in violation of 18 U. S. C. §§ 1461-2 and was sentenced to three years imprisonment on each count to run concurrently, all of which was suspended except for six months. On this appeal

* Associate Justice Tom C. Clark, United States Supreme Court, Retired, sitting by designation.

Smith asserts two errors by the trial court: (1) In refusing to ask or permit counsel to ask certain questions of the jury panel as to the contemporary community standards existing in the Southern District of Iowa relative to the depiction of sex and nudity in magazines and books; and (2) in not applying Iowa law in the determination of the contemporary community standards applicable to the case.

1. The questions that Smith wished propounded to the jury panel have to do with the juror's knowledge of the contemporary community standards existing in the Southern District of Iowa; where he acquired such information; his understanding of what the contemporary community standards are; if, in arriving at such understanding, he took into consideration the laws of the State of Iowa regulating obscenity; and finally, what is his understanding of those laws.

In support of his contention that he had a right to propound such questions to the jury panel on voir dire, Smith seems to say that as a matter of due process he has a "right to inquire of the juror what 'contemporary community standards' the juror has knowledge of, if any, and just which of the multiple 'contemporary community standards' the juror will apply to him, and the nature of the 'contemporary community standards' which the juror believes have application to him." But it is for the jury under the instructions of the trial judge to determine whether the material under scrutiny, taken as a whole, appeals to the prurient interest; whether it depicts sexual conduct in a patently offensive way; and, finally, if taken as a whole, it lacks serious literary, artistic, political or scientific value. But this definition of obscenity is "one of law * * * a legal term of art," *Hamling* v. *United States,* 418 U. S. 87, 118 (1974), not one of fact. Jurors pass on facts, not law. The juror reaches his verdict by applying the definition of obscenity given him by the judge to the facts introduced into evidence, on a contemporary community standard. He draws on his own knowledge as to the views of the average person in the community, just as he does when he determines the propensities of the "reasonable" or

"average" person in other areas of decision making. Jurors do not have such standards on their tongues; nor do they wear them on their sleeves; they are inborn and often undefinable.

This is not to say that no questions can be asked the jury panel in this area, but only that the specific ones tendered here were impermissible. They smacked of the law, of casuistry, of the ultimate question of guilt or innocence, rather than the qualifications to serve as a juror, bias, etc.

2. This case appears to be controlled by *United States* v. *Danley,* 523 F. 2d 369 (9th Cir. 1975), and *United States* v. *Hill,* 500 F. 2d 733 (5th Cir. 1974); and the Supreme Court of the United States has passed on the second question in *Hamling* v. *United States,* 418 U. S. 87 (1974), where the Chief Justice wrote:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination.

This prosecution deals with a federal statute and state law has no bearing on its decision. On the contrary, the federal statute depends on federal law as laid down by the Supreme Court. It has incorporated contemporary community standards in the determination of obscenity. In this connection we note that the trial court admitted into evidence a copy of Iowa's obscenity statute. This was done so the jury might have the knowledge of the state's policy on obscenity when it determined the contemporary community standard. However, state policy was not controlling since the determination was for the jury, not the state. The jury could have followed state policy if it found that it was the contemporary community standard; but it did not so find as it had a right to do. We are bound by the jury decision.

AFFIRMED.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT,
Southern District of Iowa,

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JERRY LEE SMITH, d/b/a Intrigue,
Defendant.

Criminal No. 75-46.

ORDER.

On September 9, 1975, a federal jury found defendant Jerry Lee Smith d/b/a Intrigue guilty on seven counts of mailing obscene material in violation of 18 U. S. C. § 1461. The Court now has before it Mr. Smith's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure providing that a new trial may be granted "if required in the interest of justice". The Court however believes that the interest of justice does not so require in this situation, and the motion will be denied.

Defendant's motion is grounded upon the assertion that the Government has failed to sustain its burden of proof to show that the materials involved affronted contemporary community standards. Several reasons are given why this is claimed to be true. First, the Court's refusal to query, or allow counsel to query, prospective jurors as to their knowledge of any such standards, second, the absence of any evidence by the Government purporting to show what the proper standard is; and third, the Government's failure to show any violation of what defendant claims to be the binding standard in this regard—Chapter 725 of the Iowa Code. Defendant also argues that if the standards for the jurisdiction of this court are in fact different from the standard supposedly set forth in Chapter 725 of the Iowa Code,

a guilty verdict offends due process in that jurors were not questioned on the subject before being impaneled.

The Court will first consider the ramifications on this entire matter of the State of Iowa's decision not to regulate obscenity insofar as adults are concerned. Defendant implies that the contemporary community standard has thus been fixed and as such should be deemed controlling for purposes of a federal obscenity prosecution. Such an argument, however, assumes too much. We are dealing with a federal law which neither incorporates nor depends upon the laws of the states. *United States* v. *Hill* (5th Cir., 1974), 500 F. 2d 733. Although the Iowa legislature has chosen as a matter of policy to deregulate the dissemination of obscene materials, except where minors are involved, the federal government has not followed a similar course. Regardless of the state laws, federal proscriptions still remain upon the mailing of obscene materials. In an effort to formulate a workable definition of obscenity for use in federal prosecutions, a "contemporary community standard" has been included as an element thereof, but it does not inexorably follow that such standards are determined by what a state legislature has elected to tolerate. The fact that a state has chosen to permit a given kind of conduct does not necessarily mean that the people within that state approve of the permitted conduct. Whether they do is a question of fact to be resolved by the jury. (See the unpublished opinion of *United States* v. *Danley* (9th Cir., 1975), No. 75-1948.) Therefore, any arguments being advanced which are premised upon the controlling nature of the Iowa law in a federal prosecution must fail.

The Court is also unable to agree that the failure to elicit or have elicited from prospective jurors the extent of their knowledge of a contemporary community standard violated any of defendant's rights. A juror's role in cases of this character is revealed in the following passage from *Hamling* v. *United States*, (1974), 418 U. S. 87, 105:

> The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is

> to permit a juror sitting in obscenity cases to draw on knowledge of the community of vicinage from which he comes in deciding what conclusion the average person applying contemporary community standards would reach in a given case.

A contemporary community standard, by its very nature, is a varying concept. Clearly, it is the intended province of the jury to determine that standard and apply it to the facts of a given situation. Instructions were given at the close of the evidence in this case as to what constitutes a contemporary community standard and how such a standard is to be discerned. This, the Court believes, is all the law demands under the circumstances. To require the disclosure of a prospective juror's knowledge in this respect is no more required than would pretrial disclosure of a juror's concept of "reasonableness" be necessary where that standard is an essential element.

Lastly, the Court cannot agree that the Government need introduce evidence of a community standard to sustain its burden of proof. As the Supreme Court has stated, "in the cases in which this Court has decided obscenity questions since *Roth* [*Roth* v. *United States*, 354 U. S. 476], it has regarded the materials as sufficient in themselves for the determination of the question". *Ginzburg* v. *United States* (1966), 383 U. S. 463, 465. The materials introduced by the Government in the trial of this case can and do speak for themselves. See also, *United States* v. *Manarite* (2d Cir., 1971), 448 F. 2d 583 and *United States* v. *Wild* (2d Cir., 1970), 422 F. 2d 34.

In view of the foregoing analysis, It is Hereby Ordered that the motion of defendant Jerry Lee Smith d/b/a Intrigue for new trial be denied.

Signed this 14 day of October, 1975.

/s/ W. C. STUART,
W. C. Stuart,
U. S. District Judge Southern District of Iowa.

CHAPTER 725.

OBSCENITY AND INDECENCY.

725.1 DEFINITIONS. As used in this section and sections 725.2 to 725.10, unless the context otherwise requires:

1. *"Obscene material"* is any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sado-masochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable material for minors, would find appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political or artistic value.

2. *"Material"* means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

3. *"Disseminate"* means to transfer possession, with or without consideration.

4. *"Knowingly"* means being aware of the character of the matter.

5. *"Sado-masochistic abuse"* means the infliction of physical or mental pain upon a person or the condition of a person being fettered, bound or otherwise physically restrained.

6. *"Minor"* means any person under the age of eighteen.

7. *"Sex act"* means any sexual contact, actual or simulated, between two or more persons, either natural or deviate, or between a person and an animal, by penetration of the penis into the vagina or anus, or by contact between the mouth and genitalia or anus, or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

725.2. DISSEMINATION AND EXHIBITION OF OBSCENE MATERIAL TO MINORS. Any person, other than the parent or guardian of the minor, who knowingly disseminates or exhibits obscene material to a minor, including the exhibition of obscene material so that it can be observed by a minor on or off the premises where it is displayed, is guilty of a public offense and shall upon conviction be imprisoned in the state penitentiary for not to exceed one year or be fined not to exceed one thousand dollars or be subject to both such fine and imprisonment.

725.3 ADMITTING MINORS TO PREMISES WHERE OBSCENE MATERIAL IS EXHIBITED. Any person who knowingly sells, gives, delivers or provides a minor with a pass or admits a minor to premises where obscene material is exhibited is guilty of a public offense and shall upon conviction be imprisoned in the state penitentiary for not to exceed one year or be fined not to exceed one thousand dollars or be subject to both such fine and imprisonment.

725.4 CIVIL SUIT TO DETERMINE OBSCENITY. Whenever the county attorney of any country has reasonable cause to believe that any person is engaged or plans to engage in the dissemination or exhibition of obscene material within his county to minors he may institute a civil proceeding in the district court of the county to enjoin the dissemination or exhibition of obscene material to minors. Such application for injunction is optional and not mandatory and shall not be construed as a prerequisite to criminal prosecution for a violation of sections 725.1 to 725.10.

725.5 EXEMPTIONS FOR PUBLIC LIBRARIES AND EDUCATIONAL INSTITUTIONS. Nothing in sections 725.1 to 725.10 prohibits the use of appropriate material for educational purposes in any accredited school, or any public library, or in any educational program in which the minor is participating. Nothing in said sections prohibits the attendance of minors at an exhibition or display of art works or the use of any materials in any public library.

725.6 SUSPENSION OF LICENSES OR PERMITS. Any person who knowingly permits a violation of section 725.2 or 725.3 to occur on premises under his control shall have all permits and licenses issued to him under state or local law as a prerequisite for doing business on such premises revoked for a period of six months. The county attorney shall notify all agencies responsible for issuing licenses and permits of any conviction under section 725.2 or 725.3.

725.7 EVIDENCE CONSIDERED. At a trial for violation of sections 725.2 and 725.3 the court may consider the material, and receive into evidence in addition to other competent evidence, the offered testimony of experts pertaining to:

1. The artistic, literary, political or scientific value, if any, of the challenged material.

2. The degree of public acceptance within the community of the material or material of similar character.

3. The intent of the author, artist, producer, publisher or manufacturer in creating the material.

4. The advertising promotion and other circumstances relating to the sale of the material.

725.8 AFFIRMATIVE DEFENSE. In any prosecution for disseminating or exhibiting obscene material to minors, it is an affirmative defense that the defendant had reasonable cause to believe that the minor involved was eighteen years old or more and the minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was eighteen years old or more or was accompanied by a parent or spouse eighteen years of age or more.

725.9 UNIFORM APPLICATION. In order to provide for the uniform application of the provisions of sections 725.1 to 725.10 relating to obscene material applicable to minors within this state, it is intended that the sole and only regulation of obscene material shall be under the provisions of these sections, and no

municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials. All such laws, ordinances or regulations, whether enacted before or after said sections, shall be or become void, unenforceable and of no effect upon July 1, 1974.